

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 14,750

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Appeal of )

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying her application for Medicaid. The

issue is whether the petitioner is disabled within the meaning of the pertinent regulations.

FINDINGS OF FACT

The petitioner is a forty-five-year-old woman with a high school education. She last worked in August, 1996, at a nursing home in California, where she injured her back. Her history of back problems since that injury is summarized in the following letter, dated August 8, 1997, which her treating orthopedist submitted to an attorney in California that is representing her in a claim in that state for workers compensation:

[Petitioner] had no history of major back difficulty or any disability prior to her employment at [place]. As you know, the patient was initially injured October 13th 1995 in the process of assisting an elderly patient with a diaper change. At that point she sustained a strain of her neck and low back which led to chiropractic treatment but no long term residual disability. The patient remained at work and re-injured herself with a slip in water at the same work site 02/05/96. She landed on the right side of her body, had a further aggravation primarily of her right low back and hip pain. She continued treating with [doctor] for management of the same. The patient continued working at the same facility until August 25 of 1996 at which point the patient was re-injured once more when she attempted to help a patient into bed. At that point the patient was dead weight and [petitioner] notes that she had severe increase in pain primarily in the right low back and hip region. The patient states that thereafter she has been incapacitated and unable to continue with her work since that required multiple episodes of lifting and bending during the course of the work day. She has moved to Vermont to be with a friend who does help her with activities of daily living such as shopping, housework, etc. [Petitioner], as you know, came under our care here in Bennington in March of 1997 for ongoing pain, mild to moderate in the neck and shoulders and intense in the right low back with episodic leg radiation. The patient was initially treating with [doctor], a chiropractor in the area, for mobilization without significant relief and he referred her to [name], my physician's assistant here at the orthopaedic office. An evaluation showed low back sprain and possible disk rupture. The patient was placed on an intensive nonoperative management program

with exercise, anti-inflammatories and without significant relief the patient was referred to [doctor], a neurologist, for EMG testing. The EMGs did confirm an acute right S1 radiculopathy. The patient, at this point, remains at a status of temporary total disability since she is only comfortable at rest. Back on her feet she will have progressing pain down the right leg into the calf and heel region. The patient has been doing intensive exercise and anti-inflammatories for treatment of same without relief.

The patient's most recent studies have included an MRI scan which reveal a large lumbar 4-5 disk rupture on the right side of the spinal canal with impingement on the nerves on the right side of the spinal canal due to facet hypertrophy. The patient, given her inability to recover with intensive non-operative management and the lumbar 4-5 disk rupture with nerve impingement would be a candidate for right-sided lumbar laminectomy and decompression of the nerve roots. The patient has requested that we schedule her for this procedure if compensation will approve.

The patient's prognosis is guarded. There is a 90% improvement rate with this type of surgery, although 10% of patients do not get relief. It should be noted that compensation patients, as a group, have a less favorable prognosis than non-compensation patients. In view of the patient's need for decompressive surgery it is too soon to state an ultimate prognosis or a degree of potential disability. Certainly if the patient undergoes surgery we will keep you informed regarding her healing, her recovery and her ultimate level of disability.

To reiterate, the patient remains at temporary total disability status and absent surgery I do not anticipate the patient's ability to return to productive employment. With surgery there is a 90% chance of relief and the level of relief is quite individual. At 12 to 24 weeks postoperatively we would be able to assess a level of any permanent partial disability.

The petitioner also suffers from chronic depression that is currently being treated primarily with medication prescribed by her primary treating physician, an internist. <sup>(1)</sup> On a June, 1997, report form filled out pursuant to the petitioner's application for general assistance, the treating physician stated that the petitioner was unable to work due to "severe depression, chronic low back pain (and) chronic headaches". The physician estimated the duration of her disability to be six months, and checked off that in addition to her usual work the petitioner was unable to work full time in any other type of employment.

In a letter to this hearing officer dated August 26, 1997, the treating physician elaborated on her opinions as follows:

Concerning your letter received 08/14/97 in this office re [petitioner], I believe that this patient does suffer from severe clinical depression. She is complying with treatment for this including medication and pursuing counseling. I do feel that she has improved about 50% since starting treatment a couple of months ago. She does, however, continue to have a severely depressed mood. She is so depressed at times that she is unable to leave her home. I am sure that this level of depression would severely interfere with her ability to maintain good attendance at the work place and especially disrupt her abilities to concentrate and interact in a reasonable manner with supervisors and co-workers. Given the fact that she has already responded somewhat to treatment, I suspect that she will continue to improve and that assuming that she does not have incapacitating chronic pain associated with her back problems, that she may be able to return to the work force in six months time.

Based on the above reports, which are essentially uncontroverted, it is found that since she was injured

in August, 1996, the petitioner has been unable to engage in any substantial activity due to severe back pain and, as of some time thereafter, from depression as well. Although it appears that her prognosis for recovery from both conditions is guardedly optimistic, it must be concluded that she has met the one-year durational test for disability.

### ORDER

The decision of the Department is reversed.

### REASONS

Medicaid Manual Section M211.2 defines disability as follows:

Disability is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, or combination of impairments, which can be expected to result in death or has lasted or can be expected to last for a continuous period of not fewer than twelve (12) months. To meet this definition, the applicant must have a severe impairment, which makes him/her unable to do his/her previous work or any other substantial gainful activity which exist in the national economy. To determine whether the client is able to do any other work, the client's residual functional capacity, age, education, and work experience is considered.

Based on the uncontroverted opinions of her treating physicians (*supra*) it must be concluded that the petitioner is physically and mentally incapable of any work and has been so disabled (at least from her physical problems) for at least one year. Therefore, the Department's decision is reversed.

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1. The petitioner maintains she has been unable to obtain services through her community mental health agency due to her inability to pay.